Petition

81-1247

Office - Supreme Court, U.S.
FILED
DEC 17 1981
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD M. SPIELER
Cross-Petitioner,

vs.

UNITED STATES OF AMERICA,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE SEARCH OF THE CROSS-PETITIONER'S BRIEFCASE WAS A PERMISSIBLE EXCEPTION TO THE RULE SET FORTH IN *ARKANSAS V. SANDERS*, 442 U.S. 756 (1979) THAT A SEARCH WARRANT MUST BE OBTAINED BEFORE SEARCHING A CLOSED PIECE OF LUGGAGE.

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United States Constitution,
Fourth Amendment

NO.

In the Supreme Court of the United States

October Term, 1981

EDWARD M. SPIELER,
Cross-Petitioner,

vs.

UNITED STATES OF AMERICA,
Cross-Respondent.

Edward M. Spieler cross-petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 646 F.2d 955 (see App. A of Petition for Writ of Certiorari). The District Court rendered no opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 19.5 and 20.5, Supreme Court Rules. The Petition for Certiorari was received on or about November 18, 1981.

STATEMENT

The Respondent was indicted with Matthew J. Moschetta and Gerald Deutsch for various firearm violations. Prior to trial, the Respondent moved to suppress the items seized from closed containers in the locked trunk of his automobile. The District Court and Magistrate suppressed all the items seized from the closed containers in the trunk of the automobile. The Court of Appeals affirmed the suppression of the search of the closed paper bags. However, the Court of Appeals reversed the suppression of the closed briefcase finding that the search came within the narrow exception set forth in footnote 11 of this Court's opinion in *Arkansas v. Sanders* 442 U.S. 756 (1979).

In September, 1978, ATF agents received unsubstantiated information from an *unreliable* confidential informant that the Respondent was manufacturing silencers in South Florida at a machine shop where he worked. The Court of appeals incorrectly found, at footnote 1 of its opinion, that the information was from a *reliable* informant. When the record reflects the agent had no knowledge of the reliability of his informant's sources of information (App. A., *infra*).

Two months later, Gregorio Suarez was introduced to the ATF agents. He agreed to work as a confidential informant after telling them that Gerald Deutsch, a co-worker of his, said he could obtain illegal silencers.

Suarez went to a gun shop with Deutsch and was introduced to Matthew J. Moschetta. Suarez related to the agents that Moschetta said his man "Ed" made the best silencers. Deutsch explained to Suarez that "Ed"

and Moschetta had been partners in the gun shop. The name EDWARD SPIELER was mentioned, nor did Suarez ever meet with EDWARD SPIELER.

On December 9th and 20th, 1978, Suarez went to Moschetta's gun shop and on each occasion received a .22 cal. pistol with silencer attached in return for payments of $1,000.00.

Two months later, on February 20, 1979, Suarez and an undercover agent went to Moschetta's gun shop and ordered an "assassination kit" and an AR-7 rifle with attached silencer from Moschetta. Two days later they furnished Moschetta with a standard grey Samsonite briefcase without any exterior distinguishing marks to be used in construction of the kit. The agent, nor Suarez met with or discussed the matter with Edward Spieler.

On the morning of February 24, 1979, Suarez told the agents to expect delivery of the items that evening. The agents began surveilling Spieler's house and his place of employment. A surveillance was set-up on his place of employment when his car was observed there. After a few hours, Spieler left the building carrying a briefcase and paper bag. He placed these items in the trunk of his car, and went back into the building. Within a few minutes, he returned to the car and began backing up. The agents blocked the path of his vehicle with one of their vehicles.

With guns drawn, they ordered Spieler out of his car. Agent Wilhjelm took the keys from the ignition, without consent, and opened the locked trunk while Spieler was being frisked at the front of the car.

Upon opening the trunk, he observed what appeared to be the stock of an AR-7 rifle, a military-type ammunition box, the briefcase, and a number of paper bags. The first container the agent searched was one of the closed paper bags. Inside he found what appeared to be silencers. He returned to the front of the car, placed Spieler under arrest, and read him his Miranda rights.

The agent then returned to the trunk. He quickly seized the briefcase and immediately opened it thinking it would contain the "assassination kit"; however, it did not (App. A., *infra* at App. 1). As it turned out, this was Spieler's personal briefcase, not the one the agents had supplied. It contained handguns, personal papers and the threaded barrel for an AR-7 rifle.

Agent Wilhjelm admitted that he opened the trunk and searched the containers inside without Spieler's consent. He admitted that at no time during the *hours* that Spieler was under surveillance, was an attempt made to secure an arrest or search warrant. (emphasis added). Lastly, the first and only time, he saw Spieler was the afternoon of his arrest.

REASONS FOR GRANTING THE CROSS-PETITION

The Court of Appeals approved the search of the briefcase as an exception to the Rule set forth in *Arkansas v. Sanders*, 442 U.S. 756 (1979) that a search warrant must be obtained before searching a closed piece of luggage. Specifically, the Court found the agent had reason to be concerned with his personal safety.

The chronology of the search of the containers in the locked trunk is important. The agent searched one of the many paper bags in the trunk first. The agent was allegedly concerned for his personal safety because the briefcase contained a dangerous instrumentality. Yet, he searched a paper bag first, stopped to place Spieler under arrest and read him his Miranda rights, and then continued his search of the containers in the trunk. The agent's actions do not evidence an overriding concern for his personal safety.

The Court of Appeals' holding is based upon its definition of an assassination kit. At footnote 2, the Court stated, "An assassination kit is an automatic pistol with attached silencer inside a briefcase with a spring-triggering device for firing the weapon without opening the briefcase." The record is devoid of testimony defining the assassination kit in these terms. Specifically, there is no testimony that the pistol inside the briefcase can be fired without opening the briefcase.

The testimony describing the assassination kit is as follows:

AGENT WIHLJELM: (On January 13, 1979)

On that particular date, Mr. Moschetta told Suarez that he could furnish—he had a friend that could make an assassination kit which is a silencer and automatic inside a briefcase (App. A at App. 1).

AGENT WIHLJELM: (On February 20, 1979 Mr. Moschetta and Agent Colaska met)

Yes, sir, it was. Special Agent Bill Volaska was working in an undercover capacity at that time Mr. Suarez met Moschetta in the evening and at this time Agent Volaska ordered a .22 caliber Ruger pistol with attached silencer inside a briefcase, attached in there with a proper mechanism for an assassination kit, plus he also ordered an AR-7 rifle with attached silencer (App. A at App. 1).

The only testimony concerning "springs" was as follows:

AGENT WIHLJELM: No sir. Anything that contains a weapon, and especially one that's hooked up by springs and so forth, I would examine it first and make sure it was unloaded before I transported it (App. A at App. 1).

From these confused and imprecise answers, there was no basis for the Court of Appeals to define an assassination kit as stated at footnote 2. Nor, is it an adequate basis for finding the briefcase might contain a "spring-triggering device for firing the weapon without

opening the briefcase", or that the briefcase contained "a loaded spring-triggering pistol." (See App. A of Petition for Certiorari at 2a; 5a footnote 4; 8a).

The aforementioned "findings of fact" were paramount to the Court of Appeals' holding that the search of the briefcase was justified by the sole exigent circumstances that it contained a dangerous instrumentality. The exigency upon which it based its decision is not supported by the record.

As stated previously the agent had no realistic fear of transporting the briefcase. He had observed Spieler carry the briefcase from the building, in an ordinary manner, to his car. Upon reaching the car, he merely placed it in the trunk. There is no testimony that Spieler handled or treated the briefcase in any special manner to prevent the discharge of any weapon that might be inside.

Agent Wilhjelm was not in fear that any weapon inside the briefcase would discharge unexpectedly. This is evidenced by his testimony:

> ". . . I continued a quick search of the briefcase, which, I thought was our government briefcase; immediately examined it and opened it up because I thought it contained at this time our assassination kit." (App. A)

He did not take any precaution in opening it. He hastily opened it expecting to find the contraband that had been ordered.

His search was not predicated upon wanting to disarm a potentially dangerous device. Agent Wilhjelm's intentions are readily apparent when queried as to why he did not immediately place Spieler under arrest:

> A: I wanted to conduct my search, sir.
>
> Q: Because you didn't know for a fact if that was the briefcase with an assassination kit or if he actually had weapons, did you?
>
> A. For a fact, I did not know for sure, no. (App. A)

His search was conducted for the specific purpose of ascertaining whether or not he had sufficient reason to arrest Spieler.

The exigent circumstance exception to the *Sanders* search warrant rule requires the searcher in good faith to believe, and there be articulable facts to conclude, his immediate safety is in danger. Absent this, when the authorities are in exclusive control of the situation, they must obtain a search warrant prior to searching.

CONCLUSION

The Court should grant this cross-petition to further define the exceptions to the *Sanders* search warrant rule.

Respectfully submitted,

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Appendix

APPENDIX A

Agent Wilhjelm's testimony at the Motion to Suppress describing the assassination kit:

A. On that particular date Mr. Moschetta told Suarez that he could furnish—he had a friend that could make an assassination kit which is a silencer and automatic inside a brief case. (Page 26).

* * * * * *

A. Yes, sir, it was. Special Agent Bill Volaska was working in an undercover capacity at that time and Mr. Suarez met Moschetta in the evening and at this time Agent Volaska ordered a .22 caliber Ruger pistol with attached silencer inside a brief case, attached in there with a proper mechanism for an assassination kit, plus he also ordered an AR 7 rifle with an attached silencer. (Page 26).

* * * * * *

Q. Is that something that you would normally transport unopened?

A. No, sir. Anything that contains a weapon, and especially one that's in a brief case like that that's hooked up by springs and so forth,

I would examine it first and make sure that it was unloaded before I transported it. (Page 33).

Agent Wilhjelm's testimony at the Motion to Suppress concerning the manner in which he conducted his search of the briefcase:

> **A. I—right immediately after advising Mr. Spieler of his rights I noticed that our agent was hurt and I inquired about his condition and I continued a quick search of the car and of the brief case which, at this time I thought was our Government brief case; immediately examined it and opened it up because I thought it contained at this time our assassination kit. (Page 33).**

Agent Wilhjelm's testimony at the Motion to Suppress as to why he did not arrest Spieler immediately, and why he searched the briefcase:

> **A. I wanted to conduct my search, sir.**
>
> **Q. Because you didn't know for a fact if that was the brief case with an assassination kit or if he actually had weapons, did you?**
>
> **A. For a fact, I did not know for sure, no. (Page 64).**

Opposition

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UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Cross-petitioner contends that the court of appeals incorrectly determined that exigent circumstances justified the warrantless search of a suspected "assassination kit" lawfully seized based upon probable cause from the trunk of his automobile.

1. The facts are set forth at pages 2-6 of the government's petition in No. 81-908, in response to which this cross-petition has been filed by Edward M. Spieler, pursuant to Rule 19.5 of the Rules of this Court. In No. 81-908, the United States contends that agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) properly searched an unsealed paper bag, found in the trunk of Spieler's automobile during a lawful warrantless probable cause search of the automobile. In his cross-petition, Spieler contends that the agents' warrantless search of a Samsonite briefcase,

which they believed to be an "assassination kit," that was also found in the trunk of the automobile was not within the exigent circumstances exception to the warrant requirement.

The district court, following a magistrate's recommendation, concluded that although probable cause to search existed, the search was unlawful because of the agents' failure to procure a search warrant. Spieler's motion to suppress the evidence was accordingly granted. The court of appeals, relying on *United States* v. *Ross*, 655 F. 2d 1159 (D.C. Cir. 1981), cert. granted, No. 80-2209 (Oct. 13, 1981), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), affirmed (81-908 Pet. App. 9a-15a) the suppression of the contents of the paper bag (several silencers), even though the court agreed that the agents had probable cause to believe Spieler was carrying contraband in his automobile (*id.* at 7a-8a).[1] However, the court of appeals reversed the suppression of the contents of the briefcase (loaded handguns and a rifle barrel), finding that exigent circumstances justified the warrantless search. The court explained (*id.* at 8a):

> Turning to the seizure of appellee's briefcase it is clear that, absent exigent circumstances, *Sanders* would apply to a Samsonite briefcase as surely as it would to a small Samsonite suitcase [citations omitted.] However, in this instance we have testimony clearly setting out an exigent circumstance. Agent Wilhjelm stated his belief that the briefcase contained a dangerous instrumentality, *i.e.*, a loaded spring triggered pistol. In light

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[1]The government's petition in No. 81-908 suggests disposition without plenary consideration in light of the Court's decision in *United States* v. *Ross*, cert. granted, No. 80-2209 (Oct. 13, 1981). As explained below, the question presented by cross-petitioner's petition is unrelated to the issue in *Ross*. Cross-petitioner evidently seeks plenary consideration.

of this belief, it would be indeed foolhardy, as this Court has previously noted, to delay a search of such containers. *See United States* v. *Johnson*, 588 F. 2d 147, 151 n.5 (5th Cir. 1979). There is ample support for the validity of such a search and for the use of any evidence gained during such search at trial. *See* [*Arkansas* v.] *Sanders*, 442 U.S. at 763-64 n.11, 99 S. Ct. at 2592-2593; *United States* v. *Chadwick*, 433 U.S. 1, n.9, 97 S. Ct. 2476, 2485, 53 L. Ed. 2d 538 (1977); *Cady* v. *Dombrowski*, 413 U.S. 443, 447-448 (1972); [*United States* v.] *Ross*, _____ F. 2d at _____; *United States* v. *Newbourn*, 600 F. 2d 452, 456 (4th Cir. 1979).

2. Cross-petitioner challenges (Cross-Pet. 6-9) the court of appeals' conclusion that the search of the assassination kit was justified by exigent circumstances. He asserts that there was "no testimony that the pistol inside the briefcase can be fired without opening the briefcase" (*id.* at 6) and that the agents' search "was not predicated upon wanting to disarm a potentially dangerous device" (*id.* at 9). These fact-bound contentions respecting the contents of the record do not warrant this Court's review.[2] In any event, cross-petitioner's characterization of the record is inaccurate.

ATF Agent Wilhjelm testified at the suppression hearing that another government agent and an informant had ordered an "assassination kit" to be constructed by cross-petitioner in a Samsonite briefcase supplied to an intermediary for that purpose (Tr. 26).[3] The agent defined an "assassination kit" as "a silencer and automatic inside a

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[2]There is no relationship between the question presented by the government's petition and that presented by the cross-petition. See note 1, *supra*.

[3]"Tr." denotes the transcript of the December 17, 1979, suppression hearing.

briefcase" (*ibid.*). The agent further described this instrumentality as "hooked up by springs and so forth" (Tr. 33), and specified that the item ordered by the undercover agent included a ".22 caliber Ruger pistol with an attached silencer inside a briefcase, *attached in there with a proper mechanism for an assassination kit*" (Tr. 26; emphasis added). Finally, in describing his reasons for proceeding with the search of the briefcase on the spot, Agent Wilhjelm explained (Tr. 70): "I opened up the briefcase because I thought it contained—it was the Government briefcase, that it did contain an assassination kit which would include a loaded weapon with a triggering device and I wanted to make it secure * * *."

Upon this record the court of appeals was fully justified in describing (81-908 Pet. App. 3a n.2) an assassination kit as "an automatic pistol with attached silencer inside a briefcase with a spring triggering device for firing the weapon without opening the briefcase." The court below also properly credited the agent's testimony that the dangerous nature of the assassination kit he thought he had before him prompted the on-the-spot warrantless search. In sum, the agents' conduct was amply justified by exigent circumstances, as the court below concluded.[4]

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[4]Cross-petitioner's argument is essentially that the agents had an insufficient basis for believing that the particular assassination kit in question had the attributes ordinarily associated with such an instrumentality. As indicated above, the record refutes that contention. But even absent the conclusive evidence in this record it is all too apparent that the ability to fire the enclosed gun is a defining attribute of an assassination kit. Law enforcement agents are fully justified in treating any object that they have probable cause to believe is an assassination kit as a dangerous instrumentality, subject to search before transportation. It would be highly unreasonable to require law enforcement agents to risk their lives upon a contrary presumption.

3. We have asked the Court to dispose of our petition in No. 81-908 in light of a decision in *United States* v. *Ross*, No. 80-2209, which is scheduled for oral argument on March 1, 1982. The question presented by the cross-petition is entirely distinct from the question presented by the government's petition and from that presented in *Ross*, and it does not warrant this Court's review. Accordingly, the cross-petition should be denied irrespective of the disposition in No. 81-908.

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1982

DOJ-1982-02